February 25, 2005

Ms. Marlene Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, S. W.
Washington, DC 20554

Re: In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C.§ 160(c) Pertaining to Qwest's xDSL Services
WC 04-416

In the Matter of Petition of BellSouth Telecommunications, Inc. For Forbearance Under 47 U.S.C. §160(c) From Application of Computer Inquiry and Title II Common-Carriage Requirements
WC 04-405

In the Matter of Petition of SBC Communications Inc. for Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Services
WC 04-29

Dear Ms. Dortch:

In accordance with Section 1.1206 of the Commission's rules, 47 C.F.R. § 1.1206, the National Association of State Utility Consumer Advocates (NASUCA) offers the attached Comments as an ex parte in the above-captioned proceedings.

NASUCA filed these Comments at the Commission on February 8, 2005 in the proceeding involving Verizon Communications' Petition for Forbearance under 47 U.S.C. § 160(c) from Title II and *Computer Inquiry* Rules with Respect to Their Broadband Services, WC Docket No. 04-440. NASUCA notes that the Verizon Petition generally raises the same issues as raised by Qwest, SBC and BellSouth in the above-captioned proceedings. Upon review of those three Petitions, it is clear that, like Verizon, Qwest, SBC and BellSouth have each failed to meet

the high standard articulated by Congress before the Commission can forbear from applying Title II and *Computer Inquiry* regulations to its broadband services. NASUCA files these Comments in these three proceedings, as an ex parte, so that NASUCA's views on these important issues may be reviewed by the Commission at all related dockets.

As discussed more thoroughly in the attached Comments, the common carrier and network neutrality obligations articulated in Title II and the *Computer Inquiry* cases require that the Petitions filed by Qwest, SBC and BellSouth be denied so that consumers have access to content, applications and equipment of their choice on a non-discriminatory basis as they use the Internet. The Commission has long recognized the value to consumers from network neutrality in the public network. NASUCA submits that network neutrality standards are essential so that the Internet can remain open and continue to offer great public and economic benefit. Furthermore, the arguments made by Qwest, SBC and BellSouth that competition from cable modem services supports an elimination of common carrier requirements are without merit and should be rejected.

Please indicate your receipt of this filing on the additional copy provided and return it to the undersigned in the enclosed self-addressed, postage prepaid envelope. Please also note that this ex parte filing is also being made electronically in each of the three above-captioned dockets.

Sincerely yours,

Joel H. Cheskis
Assistant Consumer Advocate

Enclosure

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

In the Matter of	:	
	:	
Petition of the Verizon Telephone	:	
Companies for Forbearance under	:	WC 04-440
47 U.S.C.§ 160(c) from Title II and	:	
Computer Inquiry Rules with Respect to	:	
Their Broadband Services	:	

COMMENTS OF THE
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Dated: February 8, 2005

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I. INTRODUCTION

On December 22, 2004, the Verizon Telephone Companies (Verizon) filed at the Federal Communications Commission (Commission or FCC) a Petition to forbear from applying Title II of the Telecommunications Act of 1996 (TA-96 or the Act)[1] and the Computer Inquiry[2] rules to any broadband services offered by Verizon. The Verizon Petition raises issues similar to those in the petition for forbearance filed by BellSouth Telecommunications, Inc. (BellSouth) on October 27, 2004.[3] Verizon argues, *inter alia*, that the Commission should grant its Petition because its competitors in the broadband services market are not subject to these regulations and because its Petition satisfies the forbearance requirements under section 160 of TA-96.[4]

The National Association of State Utility Consumer Advocates (NASUCA) is a voluntary association of 44 advocate offices in 41 states and the District of Columbia, incorporated in Florida as a non-profit corporation. NASUCA's members are designated by laws of their respective jurisdictions to represent the interests of utility consumers before state and federal regulators and in the courts.[5] NASUCA, as well as its individual members, has been active in many proceedings before the FCC or state commissions regarding the issues raised in

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[1] 47 U.S.C. § 151, *et seq*.

[2] *See*, Final Decision and Order, Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities, 28 F.C.C.2d 267 (1971); Final Decision, Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 F.C.C.2d 384 (1980) ("Computer II"); Report and Order, Computer III Further Remand Proceedings: Bell Operating Co. Provision of Enhanced Services; 1998 Biennial Review – Review of Computer III and ONA Safeguards and Requirements, 14 FCC Rcd 4289 (1999) (collectively referred to as "the Computer Inquiry cases").

[3] *See*, Petition of BellSouth Telecommunications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Title II Common Carrier Requirements, WC Docket No. 04-405 (field Oct. 27, 2004) ("BellSouth Petition"); *see also*, Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c), WC Docket No. 04-416 (filed Nov. 10, 2004).

[4] 47 U.S.C. §160. This section is also referred to as Section 10. Section 160 refers to the section number of the statute as codified in the United State Code.

[5] *See, e.g.,* Ohio Rev. Code Chapter 4911; 71 Pa.C.S. § 309-4(a); Md. Pub. Util. Code Ann. § 2-205(b); Minn. Stat. § 8.33; D.C. Code Ann. § 34-804(d). Members of NASUCA operate independently from state utility commissions as advocates for consumers or ratepayers. Some NASUCA member offices are separately administered as advocate departments while others are divisions of larger state agencies (*e.g.,* the state Attorney General's office). NASUCA's associate and affiliate members also serve utility consumers but are not created by state law or do not have statewide authority.

Verizon's Petition. In particular, NASUCA and its members have been active in proceedings before the FCC regarding Internet access, advanced services deployment, network unbundling obligations, interconnection obligations and consumer protection issues, all of which are implicated by the Verizon forbearance Petition. Verizon's requested relief raises a multitude of issues. NASUCA is particularly interested in the Petition as it pertains to network neutrality, that is, a consumer's ability to use content, applications and equipment of the users' choice via Verizon's broadband network. NASUCA recognizes the value to consumers in having these rights as customers of a common carrier including, for example, as it pertains to consumers' ability to access residential telephone services through Voice over Internet Protocol (VoIP) technologies. Verizon seeks forbearance from *all* provisions of Title II.[6] Verizon does not seek to reform its Title II obligations for its broadband services, but simply to eliminate them.

NASUCA submits that the FCC should deny Verizon's forbearance Petition. Verizon has failed to meet the high standard of proof established by Congress in section 160, which is required before the Commission can forbear from applying its regulations to Verizon's broadband services. Verizon's Petition fails to satisfy any of the three prongs in section 160(a). In particular, Verizon fails to show that enforcement of the Title II and Computer Inquiry regulations is not necessary for the protection of consumers and that forbearing from applying these provisions is consistent with the public interest.

It is in the public interest for consumers to have access to content, applications and equipment on a non-discriminatory basis when relying on Verizon's broadband network to access the Internet. Non-discriminatory standards are essential so that the Internet can remain

[6] Verizon Petition at 14, "applying Title II common carrier requirements in this age of abundant broadband competition would not be justified."

open and continue to offer great public and economic benefits. Such network neutrality has been a source of consumer benefit and should not be sacrificed.

If the Commission were to grant the relief requested by Verizon, consumers' opportunity to use the Internet through broadband services without discrimination would be at risk. The opportunity for competitors to access the Verizon network would also be at issue. As the statutory representatives of consumer interests in these matters, NASUCA submits that granting Verizon's Petition is not in the public interest and does not assure the necessary consumer protections required under section 160. The DSL share of the broadband market is substantial and growing. Verizon also continues to dominate this market. Given the ongoing litigation in the Brand X appeal, the FCC should not forbear from applying common carrier regulation to Verizon's broadband services. Therefore, the Commission must deny Verizon's Petition for forbearance.

In support of its Comments, NASUCA submits as follows:

II. SUMMARY

Congress has set a high forbearance standard in section 160. The Commission may forebear only where the regulation at issue is not necessary to assure nondiscrimination, protection of consumers, and furtherance of the public interest. Title II regulation is important in order to assure consumer rights to use the Internet in a neutral manner. Title II regulation is also beneficial in that it assures competitor access to these same consumers in order to offer them competitive services.

The Commission has enforced common carrier regulations in decades of precedent. The courts have also broadly interpreted the rights of consumers to use the network of a common carrier in a nondiscriminatory manner. Such network neutrality, as applied to the Internet, has offered great benefits to consumers. Dropping such nondiscriminatory requirements would allow common carriers to restrict consumer access and discourage the development of competitive services.

Current FCC Commissioners have also appropriately advocated in favor of "Net Freedoms" so that consumers will be able to access content, run applications, and attach equipment of their choice. These Net Freedoms have brought a great deal of benefit to consumers and should not be jeopardized by approval of Verizon's forbearance Petition. Without Title II regulatory requirements, Verizon may discriminate against competitors that offer competing services over Verizon's broadband services.

Verizon's argument concerning competition from cable modem providers, and other alternative broadband suppliers, does not support its request for forbearance. Cable modem and DSL providers continue to dominate the broadband market. DSL service has been closing the gap with cable modem service in the broadband marketplace. Further, the ILEC

share of the DSL market has grown as DSL competitors have lost market share. Verizon has been able to increase its market share notwithstanding common carrier regulations. The continuing litigation in the Brand X appeal means that it is not appropriate to forbear from applying common carrier regulations to Verizon's broadband services. Verizon's secondary position in the broadband market has more to do with its late start in initiating this service than with its supposed difficulties in operating as a common carrier.

III. COMMENTS

A. Verizon Must Meet a High Standard Before the Commission Can Forbear from Applying Its Title II and *Computer Inquiry* Regulations to Verizon's Broadband Services.

The Commission should deny Verizon's Petition for forbearance because Verizon has failed to carry its burden to prove that each of the elements required for forbearance has been satisfied. Verizon's broadband services are an important means by which consumers access Internet content, run applications and attach equipment of their choice. Verizon broadband is also an important means by which Verizon's competitors, e.g. Internet Service Providers (ISPs) and VoIP companies, are able to compete with Verizon and serve Verizon's broadband customers.

The standard established by Congress to have forbearance granted is very high. In order to receive a grant of forbearance, a company must meet the statutory requirements defined in section 160(a) of TA-96. This section provides

> [T]he Commission shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or a telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that
>
> 1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
>
> 2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
>
> 3) forbearance from applying such provision or regulation is consistent with the public interest.[7]

[7] 47 U.S.C. § 160(a).

In addition, Congress has directed that, in making a decision on whether forbearance is consistent with the public interest, the Commission "shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services."[8] The tests required in sections 160(a) and (b) are conjunctive such that all of these tests must be met. Verizon's forbearance Petition, however, fails to meet any of these requirements.

If Verizon's Petition is granted, Verizon's competitors would risk losing access to consumers through Verizon's broadband services. Title II requires telecommunications carriers, such as Verizon, to "establish physical connection with other carriers" and to do so in a manner that is just, reasonable and nondiscriminatory.[9] Verizon would violate this first prong of the forbearance test in section 160(a) by not adhering to these basic requirements. By eliminating Verizon's obligation to connect its facilities with other carriers who may be providing competing broadband services, Verizon would then have an opportunity to restrict the companies that provide competing broadband services in an unjust, unreasonable and discriminatory manner. This would also limit competitor access through Title II that allows competing service providers, such as VoIP companies, to provide services to consumers.

Verizon's Petition for forbearance also violates the second prong of the forbearance requirements under section 160(a). This second prong requires a showing that enforcement of the specific regulation or provision is not necessary for the protection of consumers. NASUCA, as a national representative of consumers, emphasizes that maintaining network neutrality maintains important consumer rights to use an open network.

[8] 47 U.S.C. § 160(b).
[9] 47 U.S.C. § 201(a), 47 U.S.C. § 202(a).

This right of nondiscriminatory consumer use differs from the right of carrier interconnection that is also an important part of Title II common carrier regulation. As Prof. Timothy Wu has explained,

> Network Neutrality (NN) rules are distinguished by creating rights in *users*. Rights, that is, to attach equipment or access any application or content one wants, so long as not harmful or illegal.[10]

Network neutrality is fundamentally important so that consumers can access content, run applications and use equipment of their choice. This type of neutrality has been responsible for much of the benefit enjoyed by consumers on the Internet.

Consumers also enjoy the benefits of Title II regulation through the competition that it has fostered. If Verizon were no longer required to establish physical connection with other carriers under Title II, for example, consumers could lose the benefits of multiple broadband service providers. Some of these benefits include lower prices, increased product variation and higher service quality. If Verizon were no longer required to allow competing service providers to offer service to its customers on its network, those customers would lose the protection afforded to them inherent in the competitive market.

With Title II network neutrality obligations, a Verizon customer that was not satisfied with Verizon's broadband service could switch to another service provider if the service was poor, the price was too high or the product options were limited. Without Title II network neutrality obligations, a Verizon customer who was not satisfied with Verizon's service may no

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[10] Timothy Wu, VII. Broadband Policy, A Broadband Policy User's Guide, (posted June 23, 2004), Compiled as a part of Open Architecture as Communications Policy at 251 < http://cyberlaw.stanford.edu/blogs/cooper/archives/002272.shtml#comments>. Such network neutrality rules may be contrasted with the type of "open access" rules codified at 47 U.S.C. § 251 that relate to the right of competing network service providers to interconnect with other dominant network providers. The important opportunity for competing service providers to use common carrier interconnection requirements will be discussed further below concerning competing ISPs.

longer have the option to switch service providers. This ability is necessary for the protection of consumers.

The FCC has previously recognized the importance of consumer protection when considering a carrier's forbearance petition. The Cellular Telecommunications and Internet Association (CTIA) sought forbearance from "further scheduled increases to the numbering resources utilization threshold," which at the time of the filing of the petition was at 65%.[11] CTIA argued, *inter alia*, that the scheduled increases were not necessary "to protect consumers because the national numbering crisis [had] ended, and NANP exhaust [was] not foreseeable for at least 20 years."[12] The FCC denied CTIA's request, in part, because "requiring carriers to manage their numbering inventories at increasing thresholds [was] a preventive measure that [was] necessary to *protect consumers* from premature area code changes and exhaust of NANP."[13] Consistent with the statute, the FCC has recognized the importance of considering consumer protection. Just as the FCC properly denied CTIA's request for forbearance and refused to raise the utilization threshold, so it should also deny Verizon's attempt to vitiate the basic nondiscrimination and interconnection requirements embedded in Title II.

Finally, the Commission should also reject Verizon's forbearance Petition because Verizon has failed to satisfy the third prong of the forbearance test articulated in section 160(a). The third prong requires the FCC to examine whether granting forbearance on a particular matter is consistent with the public interest. As stated above, it is in the public interest for consumers to have network neutrality in their use of broadband access to the Internet and be able to choose between competitive service providers of broadband services. If the FCC were to

[11] In the Matter of Numbering Resource Optimization, 18 F.C.C.R. 13311 (F.C.C. 2003) ("CTIA Forbearance Petition").
[12] Id.
[13] Id. at 13317 (emphasis added).

grant Verizon's Petition for forbearance, Verizon would be able to limit, if not completely eliminate, these options. Consumers could face higher prices, fewer product alternatives and little recourse in the face of poor service quality. Title II requires Verizon to allow competing service providers to have access to its network in a neutral and non-discriminatory manner. As the statutory representatives of consumer interests in this matter, NASUCA submits that it would not be in the public interest, and therefore a violation of the third prong of the forbearance test, if the FCC were to grant Verizon's petition and permit Verizon to limit competitors' access to its network to provide competing broadband services.

The FCC has also rejected two petitions for forbearance filed by telecommunications carriers because their petitions were not in the public interest, and therefore violated the third prong of the section 160(a) forbearance test. The FCC denied a forbearance request by PageNetwork, Inc. (PageNet).[14] PageNet sought a waiver of, or "in the alternative, forbearance from, the construction requirements of Section 90.665(b) and (c) of the Commission's rules applicable to 900 MHz Specialized Mobile Radio ("SMR") licensees."[15] The FCC determined that PageNet had not met the requirements of the third prong of the section 160(a) test that requires a showing that forbearance is in the public interest.[16] In noting that, under section 160, forbearance could be applied only in situations where the "forbearance is consistent with the public interest," the FCC stated that "PageNet has offered no evidence, and we have no basis for concluding, that forbearance from Section 90.665 would enhance competition among telecommunications providers."[17] Thus, the FCC has considered

[14] In the Matter of Paging Network, Inc., 15 F.C.C.R. 12141 (F.C.C. 2000).
[15] Id.
[16] Id. at 12145.
[17] Id. at 12146.

enforcement of competitive opportunities to be an important aspect of enhancing the public interest.

Furthermore, in the CTIA case, *supra*, CTIA argued that "forbearance from further [threshold] increases [was] in the public interest because it [would] reduce regulatory costs which [would] promote competitive market conditions."[18] In addition to finding that the CTIA request did not meet the first or second prongs of the section 160(a) forbearance test, the Commission also found that the request was not "consistent with the public interest to increase the threshold because [the threshold would] continue to require carriers to use numbering resources more efficiently, which [would] benefit carriers and consumers."[19]

Thus, the Commission must deny Verizon's Petition because it fails to satisfy each of the requirements of section 160(a). Verizon has failed to carry its burden in proving that the elements necessary to allow forbearance have been satisfied. The FCC has long recognized the value to consumers in allowing pro-competitive, non-discriminatory policies as part of the forbearance requirements. Granting Verizon's Petition and waiving application of Title II to Verizon's provision of broadband services will jeopardize the just, reasonable and nondiscriminatory nature of Verizon's broadband service as a means of Internet access. Furthermore, enforcement of the provisions contained within Title II is necessary for the protection of consumers and is in the public interest to ensure network neutrality and non-discriminatory access to network facilities.

B. Title II Common Carrier Standards Require that Consumers Have Access to Content, Applications, and Equipment on a Non-Discriminatory Basis as They Use The Internet.

[18] CTIA Forbearance Petition at 13315-16; *see also,* In the Matter of Warren C. Havens, 18 F.C.C.R. 26509 (F.C.C. 2003)(FCC denied a request that it forbear from applying a section of the Commission's rules regarding Automated Maritime Telecommunications Systems because no evidence was submitted that granting such request was in the public interest).
[19] Id.

1. Common Carrier Obligations Require that Verizon's Petition Be Denied so that Consumers Have Access to a Variety of Service Provider's Choices.

The Commission should reject Verizon's Petition because it would eliminate many fundamental obligations that Verizon has as a common carrier. Most notably, Verizon's common carrier obligations include providing competitors with non-discriminatory access to its network so that competitors can provide competing services. This appears to be the main reason why Verizon seeks forbearance. Verizon complains in its Petition about the excessive competitive pressures it feels in the broadband market.[20] NASUCA submits, however, that non-discriminatory access to the network is at the heart of the Title II regulations. NASUCA emphasizes that maintaining network neutrality is vital to maintain consumer rights to use an open network. Such a determination would be consistent with the pro-competitive policies articulated by Congress in TA-96 and decades of precedent that have been codified in the Act. Therefore, Verizon's Petition must be denied.

Section 153 of TA-96 defines a common carrier as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire …."[21] Newton's Telecom Dictionary has defined a common carrier as a telecommunications provider that "cannot refuse to carry you, your information or your freight as long as you conform to the rules and regulations as filed with the state or federal authorities."[22]

The underlying premise of common carrier regulation is that "the facility owner must make those facilities available to all who wish to use them, and in general may not control

[20] Verizon Petition at 3-8.
[21] 47 U.S.C. § 153(10).
[22] Newton, Harry, "Newton's Telecom Dictionary," CMP Books, San Francisco, California, 2004 at 195.

the content or services offered by others over those facilities."[23] As such, common carriers are required under sections 201 and 202 of TA-96 to sell their telecommunications services on non-discriminatory terms and conditions to any consumer that requests them.

NASUCA emphasizes that maintaining network neutrality maintains consumer rights to use an open network. This right of nondiscriminatory **consumer** use differs from the right of **carrier** interconnection that is also an important part of Title II common carrier regulation.

The Communications Act also clearly articulates the interconnection and non-discriminatory obligations of common carriers. In particular, Section 201(a) states, "it shall be the duty of every common carrier… to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes."[24] Section 202(a) states, "it shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly…."[25]

The Commission has referred to providing service on non-discriminatory terms and conditions as Open Network Architecture (ONA). ONA is a concept where

> the telephone companies are obliged to provide a certain class of service to their own internal value-added divisions and the same class of service to a nonaffiliated (ie, outside) value-added company. The concept is that the phone company's architecture is to be "open" and that everyone and anyone can gain access to it on equal footing.[26]

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[23] Earl W. Comstock and John W. Butler, Access Denied: The FCC's Failure to Implement Open Access to Cable as Required by the Communications Act, (posted June 23, 2004), Compiled as a part of Open Architecture as Communications Policy at 284 < http://cyberlaw.stanford.edu/blogs/cooper/archives/002272.shtml#comments> ("Access Denied").
[24] 47 U.S.C. § 201(a).
[25] 47 U.S.C. § 202(a).
[26] Newton's Telecom Dictionary at 598.

An open network is one that is capable of carrying information service of all kinds from suppliers of all kinds to customers of all kinds, across network service providers of all kinds, in a seamless and accessible fashion.[27] The FCC has designed ONA as "the overall design of a carrier's basic network facilities and services to permit all users of the basic network, including the enhanced services operations of a carrier and its competitors, to interconnect to specific basic network functions on an unbundled 'equal access' basis."[28] The FCC conducted a series of proceedings regarding ONA, as discussed further below.

Federal appellate courts have discussed determining whether a service provider is a common carrier. For example, the D.C. Circuit Court of Appeals has rejected "an unfettered discretion in the Commission to confer or not confer common carrier status on a given entity, depending upon the regulatory goals it seeks to achieve."[29] The D.C. Circuit stated that a "particular system is a common carrier by virtue of its functions, rather than because it is declared to be so."[30] These common carrier principles require a carrier that holds itself out indiscriminately to the public to provide a service that permits users to transmit intelligence of their own design and choosing on a common carrier basis.[31]

As demonstrated by the legislative history, TA-96 does not delegate to the Commission the authority to determine whether the common carrier requirements of the Act apply to a system based on a determination of market power, market failure, or other criteria the

[27] National Research Council, "Realizing the Information Future," (1994) at 43.
[28] Newton's Telecom Dictionary, *citing*, Telephony Magazine, March 18, 1991.
[29] National Association of Regulatory Utility Commissioners v. F.C.C., 525 F.2d 630, 644 (D.C. Cir. 1976) ("NARUC I"); *see also*, Access Denied at 285.
[30] Id.
[31] Access Denied at 320.

Commission may prefer.[32] TA-96 applied common carrier obligations to all local exchange carriers regardless of their level of market power.[33]

As such, NASUCA submits that the Commission must deny Verizon's Petition for forbearance. Verizon's common carrier obligations require that it provide consumers with access to the Internet on an open or non-discriminatory basis. If the Commission grants Verizon's Petition, Verizon would no longer have fundamental common carrier obligations that provide significant consumer protections.

2. The FCC Has Long Recognized the Value to Consumers from Network Neutrality in the Public Network.

The Commission must deny Verizon's Petition for forbearance because granting such a petition would effectively preclude consumers from receiving the benefits associated with a neutral network and the competitive provision of services. The FCC has long recognized the benefits of allowing end users to have the ability to access the public network via alternative applications or equipment as long as those alternatives do not have a detrimental effect on the network. Denying Verizon's Petition is consistent with long-standing FCC precedent that recognized the benefits to consumers of network neutrality.

As early as 1956, the FCC addressed the value of allowing consumers to attach equipment of their choice to the network. The Hush-a-phone was a cup-like device that snapped on to a telephone handset, assisted in maintaining the privacy of conversation, and reduced noise on the telephone circuit.[34] At the time, more than 125,000 Hush-a-phones had gone into use.[35] AT&T informed both vendors and users of Hush-a-phones that the device violated its tariff that

[32] Id. at 286.
[33] Id., *citing*, CONF. REP. No, 104-230, at 117, 121-22 (1996).
[34] Hush-a-phone Corporation v. F.C.C., 238 F.2d 266 (D.C. Cir. 1956) ("Hush-a-phone").
[35] Id. at 267.

prohibited attachment to the telephone of any device not furnished by the telephone company. The Hush-a-phone company filed a complaint against AT&T with the FCC seeking, among other things, an amendment to the foreign attachment provision of the tariffs to permit the use of Hush-a-phone.

The Commission agreed with Hush-a-phone that, if the use of a Hush-a-phone did not impair telephone service, a tariff provision barring use of the device would not be just and reasonable under the meaning of the Communications Act. However, the FCC found that the use of a Hush-a-phone was "deleterious to the telephone system and injure[d] the service rendered by it."[36] The FCC determined that this finding outweighed its other findings regarding the benefits to consumers of using the Hush-a-phone.[37] On appeal, however, the United States Court of Appeals for the District of Columbia set aside the FCC's Order and remanded the proceeding with directions.

The D.C. Circuit rejected the FCC conclusions of systematic or public injury related to the use of the Hush-a-phone device.[38] The D.C. Circuit further held

> [AT&T's] tariffs, under the Commission's decision, are an unwarranted interference with the telephone subscriber's right reasonably to use his telephone in ways which are privately beneficial without being publicly detrimental. Prescribing what changes should be made in the tariffs to render them just, fair, and reasonable and determining what orders may be required to prohibit violation of subscribers' rights there under are functions entrusted to the Commission.[39]

The D.C. Circuit directed the FCC to find that the AT&T tariff that prohibited such "foreign" devices resulted in unjust and unreasonable service given the consumer benefits resulting from

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[36] Id. at 268.
[37] Id.
[38] Id.
[39] Id. at 269 (emphasis added), *citing*, 47 U.S.C. § 205(a).

the use of the device. Thus, the Court required the FCC to apply a policy of nondiscrimination to benefit consumers as an essential part of Title II regulation.

In 1968, the FCC addressed the issue again in the Carterfone case.[40] The Carterfone was a device that achieved an interconnection between the public toll telephone system and a private mobile radio system by means of acoustic and inductive coupling via a voice control circuit. The circuit automatically switched a radio transmitter when the telephone caller was speaking. The telephone companies advised their customers who used the Carterfone that it violated their tariff that prohibited any "device not furnished by the telephone company from being attached or connected with the facilities furnished by the telephone company."[41] In the Carterfone case, the FCC held that the Carterfone "fills a need and that it does not adversely affect the telephone system" and that "application of the tariff to bar the Carterfone in the future would be unreasonable and unduly discriminatory."[42]

The FCC agreed with Carterfone that the Carterfone filled a need and that it did not adversely affect the telephone system. The FCC added that

> our conclusion here is that a customer desiring to use an interconnecting device to improve the utility to him of both the telephone system and a private radio system should be able to do so, so long as the interconnection does not adversely affect the telephone company's operations or the telephone system's utility for others. A tariff which prevents this is unreasonable.[43]

The FCC noted that the principle of Hush-a-phone was directly applicable.

The Hush-a-phone and Carterfone cases represent long-standing precedent that recognized the value to consumers in being able to attach equipment of their choice to the

[40] In the Matter of Use of the Carterfone Device in Message Toll Telephone Service; 13 FCC 2d 420 (1968) reconsideration denied, 14 FCC 2d 571 (1969) ("Carterfone").
[41] Id. at 421.
[42] Id. at 423.
[43] Id. at 424 (emphasis added).

network to their benefit. These network neutrality requirements are equally applicable today to Internet access and Verizon's provision of broadband services as well. Commissioner Michael Copps has stated

> More than thirty-five years ago, the Commission decided to let consumers attach devices like the Carterfone to the end of the network. And you know what? The doomsday loss of quality and control didn't come to pass. Instead, a right to attachment came into being. It brought consumers the basic freedom to attach any device to the network as long as it causes no network harm. And look at its benefits – fax machines and computer modems are direct descendants of this principle.[44]

Commissioner Copps' comments articulate the benefits reaped today resulting from the FCC's decisions nearly half a century ago to require network neutrality and non-discriminatory access to the network.

The benefits of such non-discriminatory access that had their inception in the Hush-a-phone and Carterfone cases are nowhere more evident than in the Internet, which allows any content provider easy access to the network. The Internet has provided a competitive environment that has allowed innovation to prosper. The Hush-a-phone and Carterfone cases established the essential regulatory requirement that consumers would receive the benefit of network neutrality. The fact that consumers have been able to access content and services and use equipment of their choice has been essential to the development – and economic benefit – related to the Internet.

However, the **potential** for such discrimination could chill innovation and the development of consumer benefits. When bottleneck facilities are present, an innovator may be cautious about its efforts if it knows that one company may be able to discourage the use of the

[44] Michael J. Copps, Opening Comments of Michael J. Copps, (posted June 23, 2004), Compiled as a part of Open Architecture as Communications Policy at 6 < http://cyberlaw.stanford.edu/blogs/cooper/archives/002272.shtml#comments>.

innovation. It is essential that the FCC preserve such network neutrality so that the benefit of Internet innovation may continue.

Network neutrality as created through the Hush-a-phone and Carterfone cases gives users the opportunity to use attachments or applications on the network that will not hinder others' use of the network, and gives competing service providers the freedom to supply those attachments or applications. Although at one time the innovations were a cup-like device that snapped on to a telephone instrument, today's innovations include telephone service provided over the Internet that provides unlimited calling at reduced pricing with a multitude of features at considerably reduced costs.[45]

The Internet's success was driven, in large part, by the fact that it was open during the initial deployment, which allowed for virtually any user to create or access websites. The Internet was available to all potential users on identical terms and conditions. Users did not have to negotiate rates, terms and conditions or request permission to deploy new components or services. End-users could develop an application for the Internet without being discriminated against. In fact, from its inception the Internet was designed to prevent government, corporate or any other control to defeat discrimination against users, ideas and technologies.

The Commission must deny Verizon's Petition because it puts at risk the consumer benefits created by network neutrality that flow from non-discriminatory access to the network. It may not be in the facility owner's interest to allow alternative service providers to utilize the network to provide the competing service, particularly if those competing services are new and innovative. Consumers' access to such service is clearly in the public interest, and the Commission should not allow incumbents to restrict such access.

[45] NASUCA references its Comments and Reply Comments filed at Docket No. WC 04-36 on May 28, 2004 and July 14, 2004, respectively, for more information on NASUCA's position regarding VoIP services.

Granting Verizon's Petition would be contrary to the precedent established by the Hush-a-phone and Carterfone cases nearly half a century ago. It would also be contrary to the statutory requirements for forbearance. If granted, it may stifle consumer benefits now and avoid the multitude of consumer benefits yet to be realized by innovators and consumers in the future.

3. The FCC Policy of Network Neutrality and Nondiscriminatory Access to the Network Was Continued in the Landmark *Computer Inquiry* and *Open Network Architecture* Cases.

The FCC has continued and reinforced the legacy of the Hush-a-phone and Carterfone cases over the past few decades. The Carterfone and Hush-a-phone cases have had a tremendous impact on the telecommunications regulatory landscape during that period. In one proceeding, for example, the FCC noted that Carterfone and Hush-a-phone established the "existence of broad consumer rights under Sections 201(b) and 202(a) of the Communications Act."[46] More specifically, the FCC stated:

> Rather than carving out any carrier 'rights,' these cases and the statute establish corresponding carrier responsibilities, by making unlawful any unjust or unreasonable interference with these consumer rights by the carrier. Every telephone customer has a protected right 'reasonably to use his telephone in ways which are privately beneficial without being publicly detrimental….' Among the ways a customer can reasonably use telephone service is by supplying his own terminal equipment, including telephones, PBXs and key systems, provided only that he does not harm the telephone network or cause other public detriment.[47]

As such, the FCC has reinforced the principle that, where the customer is not harming the network, he or she is free to use their telecommunications services as they please.

[46] In the Matter of Implications of the Telephone Industry's Primary Instrument Concept, 68 F.C.C.2d 1157 (FCC 1978) at para. 16.
[47] Id.

The FCC has most significantly expanded on the Carterfone and Hush-a-phone cases in the Computer Inquiry and Open Network Architecture lines of cases. The Computer Inquiry cases were an evolution of the common carrier principles to preserve open communications in the information age.

The Computer II proceeding best exemplifies the FCC's efforts in creating network neutrality amongst these lines of cases. In Computer II, the FCC stated that the "essential thrust" of that proceeding was to "provide a mechanism whereby non-discriminatory access can be had to basic transmission services by all enhanced service providers."[48] The FCC further noted, "because enhanced services are dependent upon the common carrier offering of basic services, a basic service is the building block upon which enhanced services are offered."[49] In reaching its decision, the FCC also found that the "importance of control of local facilities, as well as their location and number, cannot be overstated. As we evolve into more of an information society, the access/bottleneck nature of the telephone local loop will take on greater significance."[50]

Beginning in 1980, the FCC has distinguished "basic" telecommunications services from "enhanced" information services in the belief that ensuring access to the former would encourage competition in the latter and provide consumers with a wider variety of information services.[51] The FCC has stated that the "application of the ONA regulatory framework yields the substantial public interest benefits of broadly protecting against discrimination throughout a carrier's network and actively promoting the efficient provision of

[48] Computer II at 77 F.C.C.2d at 475, para. 231.
[49] Id.
[50] Id. at 468, para. 219; *see also*, Access Denied at 290-91.
[51] Brand X Internet Services, Inc. v. F.C.C., 345 F.3d 1120 (9th Cir. 2003), *citing*, Second Computer Inquiry, 77 F.C.C. at 384, 417 (1980).

enhanced services to the public."[52] The FCC discussed the positive aspects of an ONA framework stating, "we tentatively conclude that the application of ONA and nondiscrimination safeguards … would yield substantial public interest benefits by bringing to customers and [enhanced service providers] … the benefits of ONA, and by safeguarding against discrimination."[53]

Since the passage of TA-96, the FCC has held on multiple occasions that Congress incorporated the Computer II basic/enhanced distinctions into the Act and affirmed the FCC's holdings for the preceding two decades that facilities-based carriers cannot escape the otherwise-applicable common carrier regulation of transmission services by bundling those services with unregulated information services. In fact, the FCC's recent holding in the Cable Modem Declaratory Ruling proceeding, which is now the subject of the Brand X appeal pending before the United States Supreme Court, that cable modem service does not include a telecommunications service contradicts twenty years of FCC precedent.

Until the Cable Modem Declaratory Ruling, the FCC had consistently held that, where facilities-based carriers provide information services to the public over their own networks, the transmission underlying those information services is a common carrier service, or telecommunications service, that the carrier must sell to others on non-discriminatory terms and conditions.[54] Computer II made it clear that carriers using their own transmission facilities to provide enhanced, or information, services, must sell on non-discriminatory terms the transmission services over which those services are delivered to competing information service providers. The FCC noted in its ONA proceeding that, since its adoption of Computer II, the

[52] In the Matter of Application of Open Network Architecture and Nondiscrimination Safeguards to GTE Corporation, 7 FCC Rcd. 8664 (FCC 1993) at 8666, *citing*, BOC ONA Order, 4 FCC Rcd. 1, 11 (FCC 1988).
[53] Id. at 8667.
[54] *See*, Access Denied at 312-313.

Commission has repeatedly affirmed its position that the use of a common carrier transmission service to deliver an information service to the public does not change the regulatory classification of the transmission component as a common carrier telecommunications service.[55] The FCC further noted in the ONA proceeding that, "the addition of the specified types of enhancements to a basic service neither changes the nature of the underlying basic service when offered by a common carrier nor alters the carrier's tariffing obligations, whether federal or state, with respect to that service."[56]

As recently as 1997, the FCC noted that, in the Carterfone decision's aftermath, the Commission "progressively adopted regulations that ensured that telephone customers could freely connect CPE equipment to the telephone network so long as the connections did not cause harm."[57] The FCC again reaffirmed its position that, under Carterfone "devices that do not adversely affect the network and are privately beneficial without being publicly detrimental, may be attached to the network."[58]

It is clear that the FCC has a long-standing policy emanating from the legacy of the Carterfone, Hush-a-phone, Computer Inquiry and Open Network Architecture cases that recognizes the value to consumers in allowing network neutrality to the public switched telephone network. This legacy has remained a cornerstone of telecommunications regulation for nearly half a century. Verizon has failed to provide sufficient evidence upon which this Commission could base a determination to forbear from applying the same common carrier obligations that the Commission has applied for decades. The FCC should not take lightly the

[55] In Re: Filing and Review of Open Network Architecture Plans, Memorandum Opinion and Order, 4 F.C.C.R. 1, 141 (1988).
[56] Id.
[57] In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, 12 FCC Rcd. 5639, 5643 (F.C.C. 1997).
[58] Id. at 5645.

consequences of granting Verizon's Petition and the loss of consumer benefits that would result. Verizon's Petition must be denied.

4. Recent Pronouncements by Members of the FCC Have Also Recognized the Value to Consumers of Requiring Network Neutrality to Allow the Internet to Be Open to Consumer Use.

Current members of the FCC have recognized the benefits of network neutrality and non-discriminatory access for competitors to Verizon's network for the provision of broadband services. These Commissioners have recognized that network neutrality, *inter alia*, allows consumers to use the content, applications and equipment of their choice on the broadband network. This, in turn, creates competitive pressure on prices, allows for a variety of service offerings and certain assurances of service quality, as well as a large amount of innovation and consumer value on the Internet. Just as the Carterfone, Hush-a-phone, Computer Inquiry and Open Network Architecture cases required network neutrality decades ago, network neutrality remains vital today for a multitude of Internet applications.

Chairman Michael K. Powell issued a challenge to high-speed Internet providers urging them to adopt voluntary "Net Freedom" principles that focus on non-discriminatory access to the broadband network as a means of bringing benefits to consumers and the industry itself. Chairman Powell's "Net Freedom" principles include:

> 1. **Freedom to Access Content**. Consumers should have access to their choice of legal content.
>
> 2. **Freedom to Use Applications**. Consumers should be able to run applications of their choice.

> 3. **Freedom to Attach Personal Devices**. Consumers should be permitted to attach any devices they choose to the connection in their homes.[59]

NASUCA supports each of these principles and submits that they should continue as FCC requirements under Title II. The Commission should deny Verizon's instant Petition for forbearance, in particular, in order to assure consumers' freedom to access content, use applications, and attach equipment of their choice. If granted, Verizon's Petition would allow it to restrict consumer access to Verizon's broadband network and the Internet.

In his speech outlining these Net Freedom principles, Chairman Powell discussed the many benefits to consumers that would arise following their adoption. Chairman Powell stated,

> Companies are eager to feed consumer hunger for these Internet-related goodies. Many are racing to develop content, applications and devices they hope will entice more and more consumers to abandon dial-up and slower broadband Internet access in favor of faster broadband. But first, these companies must be able to reach broadband customers.
>
> Thus, usage and deployment of high-speed Internet depends on access to and use of content, applications and devices. Giving broadband consumers the access they want is not a matter of charity but simply of good business. Network owners, ISPs, equipment makers, content and applications developers all benefit when consumers are empowered to get and do what they want.
>
> This is why ensuring that consumers can obtain and use the content, applications and devices they want – is critical to unlocking the vast potential of the broadband Internet.

[59] *See*, "Powell Urges Industry to Adopt 'Net Freedom' Principles," Federal Communications Commission Press Release, dated February 9, 2004; *quoting*, Remarks of Chairman Powell at the Silicon Flatirons Symposium on "The Digital Broadband Migration: Toward a Regulatory Regime for the Internet Age," University of Colorado School of Law, Boulder, Colorado (Feb. 8, 2004) ("Powell February 8, 2004 Speech"). Chairman Powell also included a fourth "Net Freedom" the "**Freedom to Obtain Service Plan Information**. Consumers should receive meaningful information regarding their service plans."

> Today, broadband consumers generally enjoy such internet freedom. They can access and use content, applications and devices of their choice.[60]

NASUCA submits that the FCC should not now jeopardize those tremendous consumer benefits by granting Verizon's Petition, which would effectively inhibit consumers' opportunity to choose legal content, run applications, and use equipment of their choice.

Chairman Powell also spoke of steering clear of potential obstacles to non-discriminatory access as the high-speed Internet continues to evolve. Chairman Powell recognized that "some argue that new threats could undermine broadband consumers' easy use of content, applications and devices" and that "openness encourages competition among Internet applications and services, which will in turn make broadband platforms more valuable to both consumers and network owners."[61] Chairman Powell added,

> Preserving "Net Freedom" will preserve consumers' freedom to access and use whatever content, applications and devices they choose based on the service plan they choose. It will promote comparison shopping among the growing number of providers by making it easier for consumers to obtain access to meaningful information about the services and technical capabilities they rely on to access and use the Internet.
>
> ….
>
> Net Freedom will ensure that consumers will continue to be able to choose whatever Internet voice service that will function over their high-speed Internet connections.
>
> Preserving "Net Freedom" also will serve as an important "insurance policy" against the potential rise of abusive market power by vertically-integrated broadband providers.[62]

In a speech given just a few weeks after unveiling these Net Freedoms, Chairman Powell, in calling for the vigilance to the risks of anticompetitive behavior, stated

[60] Powell February 8, 2004 Speech at 3.
[61] Id. at 4.
[62] Id. at 6 (emphasis supplied).

> I have recognized that the vertical integration of internet applications and distribution could tempt a provider to discriminate against the font of innovative choices made available by others. Recently, motivated by this concern, I challenged the industry to adopt four simple Internet Freedoms for consumers.[63]

Chairman Powell further noted, "these freedoms will preserve consumer choice, foster competition and promote investment in infrastructure and Internet applications."[64]

Granting Verizon's instant Petition for forbearance would place at risk the "Net Freedoms" discussed by Chairman Powell. NASUCA submits that these benefits to consumers and society are preserved under the existing Title II regulations and Verizon should continue to abide by them in the provision of broadband services.

More recently, in speaking to the Voice on Net Conference in Boston, Massachusetts, Chairman Powell reiterated the value of non-discriminatory consumer access to the broadband networks in bringing about benefits to consumers, particularly noting the value of VoIP. Chairman Powell stated

> Through creative software development, competitors can create new applications that can ride on any IP platform, at substantially lower cost.
>
> This holds great promise for the communications sector. It means lower prices, greater value, more competition, and more innovative services. VoIP is barely a few years old as a retail offering and providers have already cut prices several times to compete for consumers. These are the benefits indicative of a true revolution.
>
> To realize the innovation dream that IP communications promises, however, we must ensure that a willing provider can reach a willing consumer over the broadband connection. Ensuring that consumers can obtain and use the content, applications, and devices they choose is critical to unlocking the vast potential of the Internet.

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[63] *See*, Remarks of Chairman Powell at the National Association of Regulatory Commissioners General Assembly, Washington, D.C., March 10, 2004 at 3.
[64] Id.

> Today, broadband consumers generally enjoy such freedom. Numerous benefits will follow if the industry continues to preserve choices, value and personalization that broadband users continue to expect and demand. Internet Freedom will promote comparison shopping among the growing number of providers by making it easier for individuals to obtain access to meaningful information about the services and technical capabilities they rely on to access and use the Internet.[65]

Chairman Powell further noted that "there are positive developments in this space: providers are beginning to offer 'naked DSL' access to their broadband pipe without the requirement that customers also subscribe to their voice offering."[66]

Commissioner Copps has also recognized the value of allowing non-discriminatory access to the existing broadband infrastructure and the many consumer benefits such network neutrality will bring. For example, in noting the importance of the Carterfone case, *supra*, Commissioner Michael Copps has recognized that "the Commission has reaffirmed its policy of openness and competition."[67] Commissioner Copps has recognized the significance of applying this policy to today's new technologies, such as the Internet:

> In its Computer Inquiries, another Commission said that common carriers which own transmission pipes used to access the Internet must offer those pipes on non-discriminatory terms to independent ISPs, among others. With these decisions we preserved competition in the information services market by ensuring that customers could reach independent providers .
>
> . . .
>
> Internet openness and freedom are threatened whenever someone holds a choke-point that they have a legal right to squeeze. That choke-point can be too much power over the infrastructure needed to access the internet. And it can also be the power to discriminate over what web sites people visit or what technologies they use.[68]

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[65] Id. at 2-3.
[66] Id. at 3.
[67] FCC Policies that Damaged Media Now Threatening Internet: Commissioner Copps ask in Speech "Is the Internet as we know it dying?," 2003 FCC LEXIS 5579, 12 (Lexis 2003).
[68] Id. at 11-12.

Commissioner Copps added that the Commission could play a positive role to "ensure that the networks are open for innovation"[69] and that the focus should be on maintaining and enhancing "openness and freedom on the Internet and to fight discrimination over ideas, content and technologies."[70]

In that light, the Commission must deny Verizon's Petition for forbearance because eliminating the Title II requirements that preserve network neutrality and non-discrimination would effective preclude consumers from receiving the benefits generated by these policies. These net freedoms are preserved under the existing Title II regulations and Verizon should continue to abide by them in their provision of broadband services. Approving the Verizon Petition would fail to preserve consumers' non-discriminatory access to these facilities and restrict the vital Net Freedom principles. Just as with the Hush-a-phone and Carterfone cases decades ago, network neutrality remains vital for the multitude of Internet applications that currently exist, and those that will be created in the future. Today's Commissioners must clearly reaffirm them now by denying Verizon's Petition and preserving the benefit of the Internet for consumers.

C. Non-Discriminatory Standards Are Essential so that the Internet Can Remain Open and Continue to Offer Great Public and Economic Benefit.

The great benefit that the Internet has created is dependent upon its open nature. The Internet has been designed as a neutral network where consumers may download content, run applications, and attach equipment easily and with little restriction. Because consumers are able to quickly and easily accomplish these functions, its benefits have multiplied and become a central factor in American life.

[69] Id.
[70] Id. at 26.

NASUCA does not propose in these comments to describe in detail the means by which consumers – and the economy as a whole – have received benefits from the operation of the Internet. However, as a foundation for regulatory action to maintain network neutrality, it is important to appreciate these benefits. Consumers are able to send emails with little effort and expense within their local communities and across the world. They can share documents, photographs, and recordings through email in ways that were previously difficult and time consuming. Software developers initiate new program applications that support these efforts. Consumers are able to attach their own computers, routers and other equipment with little difficulty. NASUCA is mindful of the legal restrictions that also pertain to content, applications and equipment. Notwithstanding what limitations may apply, the Internet remains a profoundly open network where innovation and expression have flourished. Robert Kahn and Vinton Cerf, two of the early developers of the Internet, explain its current status and successful growth as follows:

> As of [June 2004], an estimated 750 million personal computers are in use. It is estimated that on the order of 250 million servers are on the Internet. While it is not known exactly how much web content is online, estimates range from 750 to 7,500 terabytes. Much of the content is in databases and is not visible unless the database is queried and a web page is produced in real time in response. One of the popular web search services, Google, reports that it indexes 4.29 billion pages of material. The number of users online is estimated to be on the order of 700 million to as many as 1 billion. Virtually every user of the net has access to electronic mail and web browsing capability. Email remains a critically important application for most users of the Internet, and these two functions largely dominate the use of the Internet for most users.[71]

[71] Vinton Cerf and Robert Kahn, What Is The Internet (and What Makes It Work)?, (posted June 23, 2004), compiled as a part of Open Architecture as Communications Policy at 39 < http://cyberlaw.stanford.edu/blogs/cooper/archives/002272.shtml#comments>

Kahn and Cerf emphasize that the essential architecture of the Internet is based upon an end-to-end design by which the intelligence of the network lies at its ends. The Internet is open and transparent where data can transit the network without discrimination or restriction.

The importance of network neutrality increases given that the Internet may now also supplant the traditional circuit switched telephone network as the means by which voice communications are carried from one location to another. New high bandwidth applications may also develop that will offer further benefits and competition concerning existing video services as well.

NASUCA is concerned that, as the Internet increasingly carries voice grade telephony, common carrier requirements will become even more important in the future. To the extent that the growing level of VoIP services are carried over the Internet, allowing broadband providers to discriminate and restrict Internet services will further restrict the extent to which these services will benefit consumers.

It is the assurance of network neutrality that has spawned growth and innovation and promises further benefits. As Professors Lemley and Lessig have explained, the promised neutrality of the Internet has been at the heart of this innovation as described below:

> Because it does not discriminate in favor of certain uses of the network and against others, the Internet has provided a competitive environment in which innovators know that their inventions will be used if useful. By keeping the cost of innovation low, it has encouraged an extraordinary amount of innovation in many different contexts. By keeping the network simple, and its interaction general, the Internet has facilitated the design of applications that could not originally have been envisioned. To take just a few examples, Internet telephony, digital music transfer, and electronic commerce are all applications far outside the range of expectations of those who designed the Internet (or even those who, much later, created the World Wide Web). Indeed, e-mail itself, the first true "killer app" of the Internet, was an unintended byproduct hacked by early users of the network, not the point of the

> network itself. By keeping the cost of innovation low in the future — especially in the context of broadband media — the design of the Internet should continue to facilitate innovation not dreamed of by those who built it.[72]

As Verizon and other carriers offer faster broadband services, even greater innovations will become possible. However, if Verizon no longer must maintain a neutral network, such innovative developments may not come about.

It is not the actual imposition of network discrimination, but the potential for such discrimination, that can have a direct effect upon continued innovation.

> The potential for discrimination has an obvious effect upon innovation today, whether or not there is any actual discrimination now. The question an innovator, or venture capitalist, asks when deciding whether to develop some new Internet application is not just whether discrimination is occurring today, but whether restrictions might be imposed when the innovation is deployed. If the innovation is likely to excite an incentive to discrimination, and such discrimination could occur, then the mere potential imposes a burden on innovation today whether or not there is discrimination now. The possibility of discrimination in the future dampens the incentives to invest today.[73]

NASUCA emphasizes that it is necessary to protect the type of common carrier non-discrimination over Verizon's broadband services that exists today. Otherwise, future Internet innovations may be lost before they are developed.

Moreover, there is real potential for broadband providers, such as Verizon, to discriminate against rival applications. As noted above, the Internet may develop as a platform for voice services that will increasingly compete with the existing voice services now conveyed over the circuit switched network. VoIP developers have been able to develop and market VoIP

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[72] Mark Lemley and Lawrence Lessig, The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era, (posted June 23, 2004), compiled as a part of Open Architecture as Communications Policy at 46 < http://cyberlaw.stanford.edu/blogs/cooper/archives/002272.shtml#comments>

[73] Timothy Wu and Lawrence Lessig, Ex Parte Submission in CS Docket No. 02-52, (posted June 23, 2004), Compiled as a part of Open Architecture as Communications Policy at 258 < http://cyberlaw.stanford.edu/blogs/cooper/archives/002272.shtml#comments>

services because the Internet has remained open. Many VoIP providers offer voice services over broadband connections in order to compete with existing voice services. Verizon has presently initiated its own broadband-based VoIP service. Broadband services offer a competing platform for VoIP. Broadband providers will have a strong incentive not to abide by the type of common carrier nondiscrimination restrictions that the Commission has traditionally applied through Title II regulation. The Commission should continue to require network neutrality in order to foster competition of many kinds. Otherwise, the potential for VoIP and other applications to challenge existing services may be lost before they are fully developed.

D. Preserving the Opportunity to Choose Among Competing ISPs Is an Important Means of Preserving Consumer Access.

As NASUCA has commented above, it is essential that the Commission preserve network neutrality through common carrier regulation. The importance of this requirement is to maintain the open nature of the Internet. It is essential that consumers are able to enjoy the open Internet platform as explained above.

The opportunity for consumers to choose from competing ISPs also depends on the preservation of network neutrality. ISPs function as a gateway to the Internet and may offer different levels of Internet access. NASUCA supports the opportunity for ISPs to interconnect with carriers, such as Verizon, so that they may offer competing Internet packages. If the Commission exempts Verizon from complying with the Title II common carrier requirements, Verizon will determine whether ISPs will have the opportunity to interconnect with Verizon and use its facilities to offer competing broadband related Internet services.

The opportunity for competing ISPs to use the network services of other carriers is an important aspect of the Commission's long standing requirements under its Computer Inquiry decisions. The Commission fostered a competitive environment for ISPs by requiring

basic services offered over common carrier transmission facilities to be offered on equal terms to enhanced service providers, such as ISPs. This decision has fostered a competitive ISP market. It has been one of the hallmarks of the Commission's forward-looking competitive policies. This policy has done a great deal to foster an open and competitive ISP market and must be preserved. The Commission must continue to allow interconnection opportunities to support a competitive ISP market.

E. Competition from Cable Modem Services Does Not Support an Elimination of Common Carrier Requirements.

1. Introduction.

In its Petition, Verizon urges the Commission to apply the same "light hand" in the regulation of ILEC retail broadband services as it has used to regulate cable modem service. Verizon contends that Title II and Computer Inquiry rules should not apply to ILEC broadband services, because (1) there is "intense" intermodal competition in the broadband market, (2) ILECs hold "secondary status in *every* segment of the broadband market," (3) "lower regulatory burdens" apply to "*all* other participants in the market," and (4) application of these regulations to broadband "would affirmatively harm consumers by preventing more effective competition and hindering increased deployment of broadband services."[74] The Commission must reject these arguments.

2. "Intermodal Competition" For Consumer Broadband Services Is Limited To DSL And Cable Modem Service.

Despite Verizon's assertions to the contrary, there currently exist only two viable retail broadband offerings for mass-market consumers, those being cable modem and DSL. Together, these services account for 97.3% of the 30-million high-speed lines provided to

[74] Verizon Petition, at 2-3, emphasis in original.

residential and small business consumers.[75] Although Verizon references the "growing list of competitive, broadband platforms," including fixed wireless, satellite, Broadband over Power Line (BPL), and Third Generation (3G) wireless,[76] these alternate providers are currently merely niche players. As such, they cannot realistically be considered as viable challengers to DSL and cable modem providers serving mass-market broadband consumers. Market data clearly supports this position: as of June 2004, satellite and wireless carriers combined accounted for just 1.3% of the total high-speed lines supplied to residence and small business users,[77] which is more than a 50% reduction from the 2.8% market share held in December 1999.[78] While the number of cable modem and DSL lines has increased by 27.6 million since December 1999, *all other service providers have added just 700,000 lines in that four and one-half year period*.[79] The relative newcomers to this market, 3G wireless and BPL, are so limited in their availability as to not even register as a blip on the radar for consumer broadband services, and thus are unequivocally nothing more than potential competitors at this time.[80]

Verizon's Petition is devoid of any evidence to suggest that the current market dominance of cable modem and DSL is in danger; to the contrary, the trends in the market indicate that their positions are strengthening, at the expense of other technological platforms. Verizon seeks to characterize the broadband market as being in a state of development.[81] Yet, it

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[75] FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, High-Speed Services for Internet Access: Status as of June 30, 2004 (December 2004) ("High-Speed Service Report"), at Table 3.
[76] Verizon Petition at 6.
[77] High-Speed Service Report at Table 3. Satellite/wireless market share has remained virtually unchanged since June 2002.
[78] Id.
[79] Id. "All other service providers" include providers of wireline technologies other than DSL ("including traditional telephone company high-speed services and symmetric DSL services that provide equivalent functionality"); providers of optical fiber to the subscriber's premises; and providers of satellite and fixed wireless systems. High-Speed Service Report, Note 2 (for Tables 1-4 and Charts 1-8).
[80] Fourth Report to Congress on Availability of Advanced Telecommunications Capability in the United States, 19 FCC Rcd 20540 (2004) ("Fourth Section 706 Report") at 20-23.
[81] Verizon Petition at 4, 7. As support for the statement, that the broadband market is *still* "in the earliest stages," Verizon cites to the 1997 *Bell Atlantic/NYNEX Merger Order*, which is now more than 7 years old.

is important to remember that wireless and satellite broadband providers have been considered "potential competitors" by the FCC for *years*,[82] and there is no substantive basis from which to conclude that position will change anytime soon. Indeed, the FCC recently stated that satellite broadband service "remains a nascent technology," with only about 200,000 subscribers.[83] NASUCA agrees that the Commission should embrace Verizon's suggestion to analyze broadband markets for their likely potential and not simply as they exist today. The Commission should, as Verizon states, "take account of 'future market conditions,' including technological and market changes, and the nature, complexity and speed of change, as well as trends within the telecommunications industry."[84] The reality is that all signs point to a mass market that is today dominated by DSL and cable modem service, and one that will continue to be so for the foreseeable future.

While Verizon argues that, the alternative offerings from BPL, 3G and satellite broadband providers will one day challenge DSL and cable modems for widespread consumer use, that is decidedly *not* the case today. Nor have other potential competitors emerged from the shadows of the DSL and cable modem providers and assumed a spot as a viable competitive alternative for consumers. What most mass-market consumers have is *at best* a cable

[82] Verizon quotes from the FCC's Order regarding AT&T's purchase of cable operator MediaOne, in which the FCC stated that that cable and DSL face "significant actual and potential competition from … alternative broadband providers." Verizon Petition at 6, quoting Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee, 15 FCC Rcd 9816, ¶ 116 (2000). Not only is that Order more than four years old, at the time it was issued, alternative providers accounted for just 2% of the residential and small business market for high-speed lines. High-Speed Service Report at Table 3. Verizon's Petition also references the more recent 2003 *Triennial Review Order*, in which the FCC "acknowledged the important broadband *potential* of other platforms and technologies, such as third generation wireless, satellite and power line." Verizon Petition at 6, footnote 17, *quoting* Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, 18 FCC Rcd 16978, ¶ 263 (2003) ("Triennial Review Order")(emphasis supplied).

[83] Fourth Section 706 Report at 23.

[84] Verizon Petition at 7, footnote 20.

modem/DSL duopoly.[85] Such a limited duopoly does not advance the public interest. Additionally, to the extent that Verizon is correct that the consumer broadband market is "still developing," then that is all the more reason *not* to forbear from applying Title II and Computer Inquiry regulations to ILEC broadband service, as doing so could effectively close the door on these and other potential competitors in the broadband market.

3. Verizon Overstates Its "Secondary Status" Market Position for Retail Consumer Broadband Services.

Verizon asserts that cable modem providers are the "distinct market leader, followed far behind by DSL offered by both incumbents and competitive local exchange carriers,"[86] and considers DSL providers to be "distant second-place competitors in each segment of the broadband market."[87] While it may be true that cable operators "got the jump" on ILEC DSL providers in terms of rolling out a mass-market broadband service offering,[88] this initial advantage has narrowed. Price and speed of service are comparable between these two services, and each provider has the ability to bundle high-speed internet access with other core services (video, local, long distance and wireless telecommunications) at attractive prices. The most recent FCC data indicate that the disparity in market position between cable modem and DSL

[85] While cable and DSL networks often overlap, even Verizon admits that there are areas where only one such service is offered. *See, e.g.,* Verizon Petition at 5, citing Letter from Dee May, Verizon, to Marlene H. Dortch, FCC, Technological and Market Developments Since the Triennial Review Further Demonstrate that Competitors Are Not Impaired Without Access to Unbundled Mass Market Switching, CC Docket Nos. 01-338, 96-98, 98-147, at Attachment 2 (filed June 24, 2004). Moreover, given the price differences between cable modem and DSL service on the one hand and broadband satellite and fixed wireless services on the other, it is highly likely that customers choosing to subscribe to these higher-priced services do so because it is the only option available to them. *See* Fourth Section 706 Report, at 23, which states that the two major providers of high-speed Internet service via satellite primarily serve small office/home office and small business customers "that are not currently served by wireline broadband providers or cable companies."

[86] Verizon Petition at 3-4; *citing* Fourth Section 706 Report.

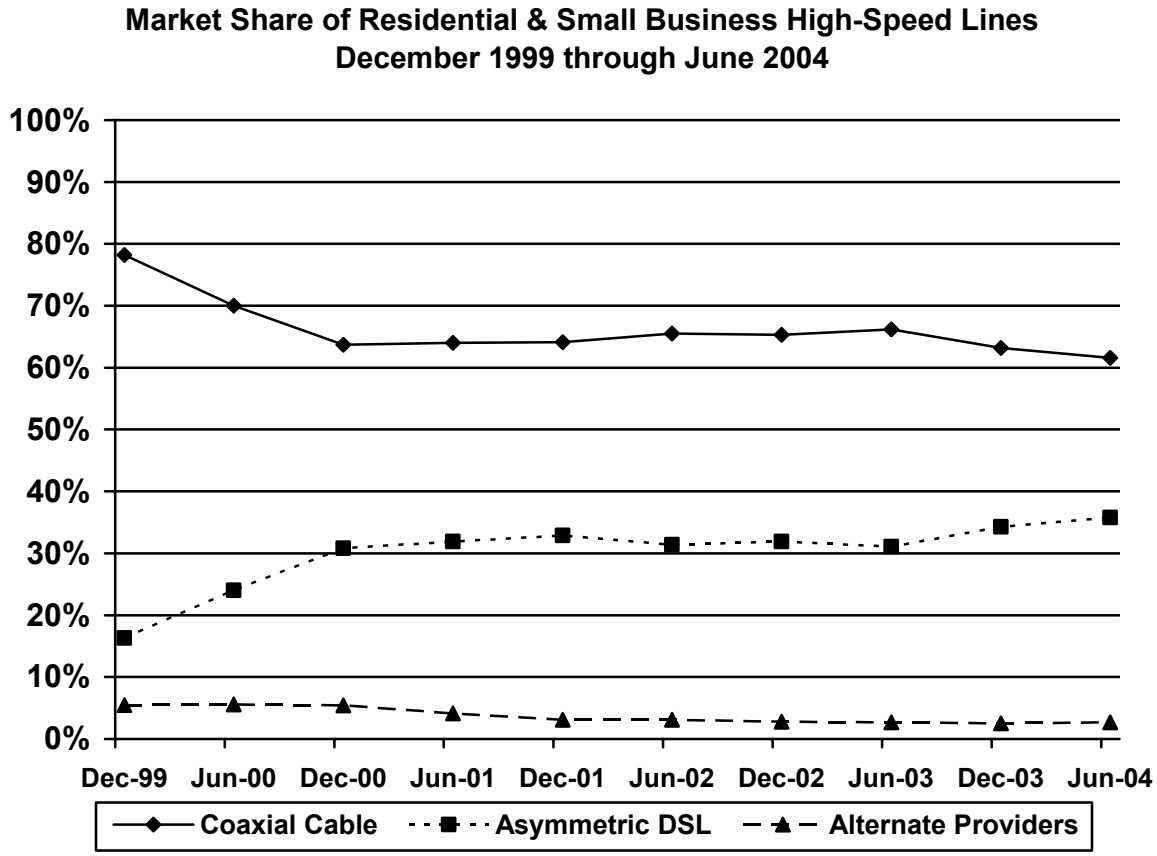
[87] Id. at 4.

[88] The reason cable modems got a "head start" in the broadband market was arguably not due to any inherent advantage held by the cable companies, but rather to the ILECs' own slow reaction to the demand for high-speed Internet access by mass market consumers at reasonable prices, as well as their possible preference to sell already-deployed "second lines" for dial-up internet access in lieu of the more costly network upgrades necessary to deploy DSL service.

providers is narrowing. Net additions to residential and small business cable modem and DSL line counts were quite comparable over the six-month period ending June 2004, with each adding about 2 million lines.[89] Over the twelve-month period ending June 2004, DSL additions trailed cable modems by just 11% (4.9-million for cable modems versus 4.3-million for DSL).[90]

Of considerable note is the *rate of growth* for DSL, which over the most recent six-month period exhibited a 21% increase in residential and small business high-speed lines (versus 13% for cable modems), and a 67% growth rate between June 2003 and June 2004 (as compared to 36% for lines served by cable modems). The most telling statistic, however, is that since December 1999, DSL market share for residential and small business high-speed lines has more than doubled, from 16.3% to 35.8% – no small feat, considering that the overall market increased 1600% during that time. Yet over this same four and one-half year period, *no other service platform increased market share*.[91]

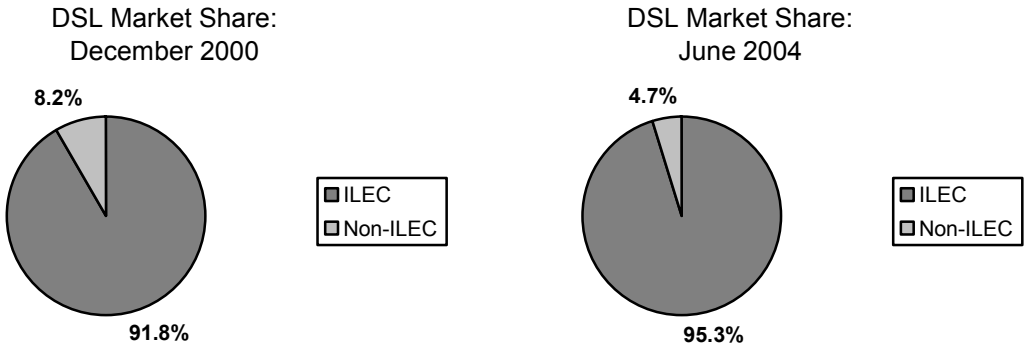
[89] High-Speed Service Report at Table 3.
[90] Id.
[91] Id., at Chart 6. Most notably, cable modems have lost 17% market share over that same period. "Satellite/wireless" and "other wireline" providers have seen their market share decrease by more than 50%.



Source: *High-Speed Services Report*, at Table 3.

Although Verizon seeks to portray itself as just another non-dominant competitor in the overall broadband services market, the Commission must not lose sight of the fact that Verizon and other incumbent LECs are the *overwhelmingly dominant* providers within the DSL market. When the market for DSL services first opened, a number of small upstart broadband providers quickly established themselves as alternates to the ILECs' service offering, and the intramodal competition for DSL service was fierce. Once the ILECs recognized the significant market they had heretofore ignored, they responded with a combination of buyouts, aggressive marketing and pricing plans, and a relentless pursuit of regulatory policy changes. Many so-called "data CLECs" fell into bankruptcy or, at the very least, into a much less enviable market

position. Indeed, as far back as December 2000 (the first year for which the FCC collected data), the ILECs had clearly established themselves as the primary provider of DSL services, controlling 91.8% of the DSL market for residential and small business high-speed lines.[92] Since that time, the ILECs have actually grown their market share to 95.3% as of June 2004.[93] By maintaining (indeed, by *growing*) their dominant position *within* the DSL market, the ILECs have effectively positioned themselves as monopoly providers of high-speed services to mass market customers in those areas where intermodal competition does not exist. The general lack of intramodal competition for DSL service under the current regulatory rules means that consumers in those geographic markets where DSL is the only high-speed service option[94] see little prospect for DSL competition. Granting Verizon's Petition (and others like it) will effectively create an unregulated monopoly in these areas from which consumers will have little, if any, protection.



Source: FCC, Common Carrier Bureau, Industry Analysis Division, "High-Speed Services for Internet Access: Subscribership as of December 31, 2000," Table 4: High-Speed Lines by Type of Provider as of December 31, 2000, and FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, "High-Speed Service for Internet Access: Status as of June 30, 2004," Table 5: High-Speed Lines by Type of Provider as of June 30, 2004.

[92] FCC, Wireline Competition Bureau, Industry Analysis Division, High-Speed Services for Internet Access: Subscribership as of December 31, 2000 (August 2001), at Table 4.
[93] High-Speed Service Report at Table 5.
[94] Verizon acknowledges it faces no cable modem competition for 8% of the population within the top 25 Metropolitan Statistical Areas (MSAs) in its service territory. Verizon Petition at 5.

Even without the further deregulatory action sought by Verizon, the continued existence of intramodal competition for DSL services is questionable. Previously, the Commission's *Triennial Review Order* eliminated any further line sharing obligations by the ILECs following a three-year transition period.[95] While certain competitors have entered into "commercial agreements" with the incumbents with regard to their line sharing arrangements,[96] it is unclear what effect the expiration of the transition period will have on the continuation of these agreements, and what that future impact will be on consumers. More recently, the Commission clarified that incumbent LECs deploying "next-generation" fiber-based loops (fiber to the curb or FTTC) are immune from any unbundling obligations.[97] Verizon immediately announced its plans to capitalize on this opportunity with a "massive rollout of a [fiber to the premises] network that will increase competition between itself and cable companies."[98] The absence of any reference by Verizon to competition from alternative DSL providers is not accidental. Quite simply, granting Verizon's Petition, coupled with the additional regulatory relief already bestowed by the FCC, would speed the demise of those remaining competitive DSL providers.

4. The Ninth Circuit's Ruling Regarding Cable Modem Service Has Called into Question Whether the Current Disparate Regulatory Treatment Applied to ILEC and Cable Broadband Services Will Continue.

[95] Triennial Review Order, ¶ 255.
[96] *See*, *e.g.*, Covad News Room, "Covad and Qwest Sign Commercial Line-sharing Agreement," April 15, 2004, available at http://www.covad.com/companyinfo/pressroom/pr_2004/041504_news.shtml, accessed January 24, 2005.
[97] Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98; Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147; Order on Reconsideration, released Oct. 18, 2004.
[98] Verizon Petition, at 5, citing Verizon Oct. 21 2004 News Release, "Verizon Deploying Fiber Optics to Homes and Businesses in 6 More States in Northeast and Mid-Atlantic" (emphasis supplied).

In its Petition, Verizon complains that it is subject to burdensome regulations in markets (1) where it is not a dominant service provider, and (2) where the provider that Verizon considers dominant is subject to less regulation. While it is true that the Commission made a finding in its *Cable Broadband Ruling* that cable modem service is a Title I "information service," and thus should *remain* free from Title II common carrier regulation,[99] the Commission's ruling on this matter has been overturned by the Ninth Circuit Court of Appeals.[100] In so doing, the Ninth Circuit has effectively created regulatory parity between cable modem and DSL service providers that Verizon so heartily has endorsed. Yet rather than applaud the Ninth Circuit's ruling for creating regulatory parity between cable modems and DSL, Verizon calls the decision a "dubious" one[101] and expects it to be overturned by the Supreme Court.[102] Verizon is obviously not so much interested in obtaining *regulatory* parity as with obtaining *deregulatory* parity with cable modems.

If the Ninth Circuit's decision is upheld by the Supreme Court, the merits of Verizon's "me, too" arguments for deregulatory parity found in its Petition[103] will not only fail, but they would actually *support* NASUCA's position that ILEC broadband services remain under Title II common carrier regulation. It would be wholly premature for the Commission to grant Verizon's Petition for forbearance in the face of a forthcoming Supreme Court decision on this matter that may dramatically undercut Verizon's position on this issue.

Should the Supreme Court overturn the Ninth Circuit and find that the FCC's ruling was in fact correct, such a ruling would not automatically lend support to Verizon's search

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[99] Inquiry Concerning High-Speed Access to Internet over Cable and Other Facilities, 17 FCC Rcd 4798 (2002)("Cable Broadband Ruling").
[100] Brand X Internet Services, Inc. v. FCC, 345 F.3d 1120 (9th Cir. 2003).
[101] Verizon Petition, at footnote 32.
[102] The Supreme Court recently granted certiorari on this case, and should issue a final ruling on this matter in the coming months. FCC v. Brand X Internet Services, No. 04-281, cert. granted, 2004 U.S. Lexis 7980 (Dec. 3, 2004).
[103] Verizon Petition, at 9-11.

for regulatory parity between cable modem and DSL services. In reaching its decision that cable modem service is a Title I information service, the FCC explained that there is no distinction between the information and telecommunications components of cable modem service. The FCC has made no similar finding for DSL services provided by incumbent LECs.[104]

Moreover, the FCC concluded that the only manner in which cable companies could make a distinction between the "information" and "telecommunications" services comprising cable modem service would be to *create* such a distinction. No similar problem exists for DSL broadband service, as the "telecommunications" and "information" services encompassed within DSL are readily apparent and separable. The existence of this separate telecommunications component, which is being provided by a dominant wireline LEC with market power in the provision of telecommunications services, is sufficient reason to retain Title II regulation over ILEC wireline broadband service offerings.

5. Regulatory Parity Between All Broadband Service Providers Is Not Required to Encourage the Continued Availability and Deployment of ILEC Broadband Services.

Verizon contends that Title II regulations impose "unnecessary" burdens on ILECs that prevent competition.[105] In particular, Verizon makes the following claims relative to the imposition of Title II requirements on wireline broadband services:

- Because it must develop, file and defend cost support data, Verizon must delay the introduction of new services to consumers.
- Because it must file tariffs, Verizon experiences (1) a reduced ability to respond to customer demand and cost; (2) substantial administrative costs; (3) limitations

[104] While the Commission is considering these issues in CC Docket Nos. 01-337 and 02-33, Verizon's Petition precedes any findings made by the Commission on this matter.
[105] *Verizon Petition*, at 14.

in the ability of customers to obtain specially tailored service arrangements; and (4) reduced incentive to offer new services or respond to new offerings by rivals due to rivals' advance notice of promotions and service changes.

- Because it must cost-justify its rates, Verizon is prevented from experimenting with innovative pricing arrangements.[106]

Among other things, Title II regulations exist in order to limit the ILECs' ability to leverage its dominant position in the market for narrowband services into the broadband service market, through cross-subsidization, affiliate transactions, cross-platform marketing,[107] and other means. Whereas satellite and wireless carriers have been competing in the market for years and in that time have managed to secure less than 2% of the market, ILECs like Verizon, who by their own admission were late to the broadband mass market, have dramatically increased market share over the last few years.[108]

Verizon has also failed to provide any substantive discussion as to *precisely* how these "unnecessary" burdens harm it in such a way that it is unable to compete vigorously with cable broadband providers. While there is certainly no argument from NASUCA that the costs associated with preparing and filing cost studies and tariffs are greater than zero, there is no discussion from Verizon regarding the magnitude of these costs as they relate specifically to wireline broadband services. Verizon will undoubtedly maintain its staff dedicated to tariffs, cost studies and other administrative tasks associated with its provision of other Title II regulated services going forward. It is therefore a stretch to believe that the *incremental* cost of making these filings for DSL service is sufficiently high as to restrict Verizon's ability to compete effectively in the consumer broadband market. Nor has Verizon provided any evidence, factual

[106] *Verizon Petition*, at 14-15.
[107] *E.g.*, using the "inbound" service calls from telephone customers to sell non-POTS-related services.
[108] *Verizon Petition*, at 9.

or anecdotal, to support its contention that Title II requirements have caused delay in the introduction of new broadband services, let alone that such delays have somehow harmed consumers. ILEC DSL providers are not shy about introducing new services, service bundles, or pricing plans to compete with cable modem service, irrespective of their need to tariff these services.

Verizon further contends that application of the *Computer Inquiry* rules to ILEC broadband services conflicts with Congress' desire to promote broadband deployment through reduced regulation.[109] Verizon states that these rules "hinder the development of new broadband services" and "discourage investment and … new broadband deployment."[110] As discussed in detail below, Verizon's actions with regard to broadband deployment overshadow its own arguments for deregulation. Verizon's contention that it should not be required to "separate out and offer separately the physical [transmission] components of [its broadband] services" ignores the fact that there already exists a separate telecommunications service offering within its broadband service. As was the case with respect to Title II regulations discussed above, the *Computer II* unbundling requirement exists in order to reduce the ability of wireline providers to leverage their monopoly power in the wireline voice market into the wireline broadband market. The presence of cable modem providers in the consumer broadband market does not reduce, let alone eliminate, the need to protect consumers and competitors from the improper use of market power by incumbent LECs.

Verizon's arguments against Title II regulation and *Computer Inquiry* requirements overlooks the fact that Verizon has aggressively pursued broadband deployment initiatives and has been successful in securing an ever-increasing share of the expanding

[109] *Verizon Petition*, at 22.
[110] *Verizon Petition*, at 22.

consumer broadband market despite the presence of these regulations. Despite its protest of being "handicapped" by regulation, Verizon has enthusiastically pursued its broadband deployment plans. As stated in its 2003 annual report, Verizon "extended the reach of [its] high-speed DSL service and grew [its] customer base by almost 40 percent…."[111] As of December 31, 2003, approximately 80% of Verizon's lines were DSL-qualified.[112] This number has surely grown over the past year, given the rate at which Verizon continues to upgrade its network.

Moreover, Verizon has further proclaimed the widespread deployment of fiber optics, Internet switches and other next-generation technologies to better equip its network to support the simultaneous transfer of voice, data and video.[113] Indeed, in its Petition, Verizon underscores the Company's commitment to broadband deployment beyond current DSL technologies:

> Verizon is in the early stages of a massive rollout of an FTTP network that will increase competition between itself and cable companies with respect not only to broadband services, but also with respect to video and telephony. As part of its FTTP rollout, Verizon plans to pass three million homes and business [*sic*] by the end of 2005.[] Accordingly, Verizon intends not only to increase competition and improve broadband services they are [*sic*]providing to consumers, but also intends to bring new competition into markets like video where cable continues to dominate.[114]

It is quite clear that Verizon has not limited its ongoing investment in its broadband network because of the Title II and *Computer Inquiry* rules and regulations that currently apply to the Company's DSL services.

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[111] Verizon 2003 Annual Report. *See* http://investor.verizon.com/2003annual/newworld/newworld5.shtml, accessed January 18, 2005.
[112] Verizon 2003 Annual Report. *See* http://investor.verizon.com/2003annual/financials/mda8.shtml, accessed January 18, 2005.
[113] Verizon 2003 Annual Report. *See* http://investor.verizon.com/2003annual/newworld/newworld5.shtml, accessed January 18, 2005.
[114] *Verizon Petition*, at 5, footnotes omitted.

IV. CONCLUSION

WHEREFORE, NASUCA respectfully requests that the Commission deny the Petition for forbearance filed by Verizon. The Verizon Petition fails to satisfy the very high standard required by Congress for the FCC to forbear from applying its regulations. Verizon has failed to meet any of the three prongs in that standard. It is vital and in the public interest for non-discriminatory standards to be in place so that consumers have access to content, applications and equipment on a non-discriminatory basis as they use the Internet. Such standard is essential so that the Internet can remain open and continue to offer great public and economic benefits.

Respectfully submitted,

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